

**Minutes of Fall 2009 Meeting of
Advisory Committee on Appellate Rules
November 5 and 6, 2009
Seattle, Washington**

I. Introductions

Judge Jeffrey S. Sutton called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, November 5, 2009, at 8:30 a.m. at the Fairmont Olympic Hotel in Seattle, Washington. The following Advisory Committee members were present: Judge Kermit E. Bye, Justice Randy J. Holland, Ms. Maureen E. Mahoney, Dean Stephen R. McAllister, and Mr. James F. Bennett. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice (“DOJ”), was present representing the Solicitor General. Also present were Judge Lee H. Rosenthal, the Chair of the Standing Committee; Judge Carl E. Stewart, the past Chair of the Appellate Rules Committee; Judge T.S. Ellis III, a past member of the Appellate Rules Committee; Judge Harris L. Hartz, liaison from the Standing Committee; Professor Daniel R. Coquillette, Reporter to the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Leonard Green, liaison from the appellate clerks; Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office (“AO”); and Ms. Marie Leary from the Federal Judicial Center (“FJC”). Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Sutton welcomed the meeting participants and introduced Mr. Green. Judge Sutton noted that Mr. Fulbruge’s contributions as clerk liaison to the Committee were irreplaceable but that the Committee is very fortunate to have, as Mr. Fulbruge’s successor, someone as experienced as Mr. Green. Judge Sutton noted that the Committee will particularly benefit from Mr. Green’s experience with the Sixth Circuit’s transition to electronic filing.

Judge Sutton pointed out to the Committee the tribute to Mark I. Levy that was displayed in the meeting room. Judge Sutton recalled that at the first Appellate Rules Committee meeting he attended (in San Francisco in April 2006), Mr. Levy took the time to have lunch with him and other new participants and to make them feel welcome. He was a great friend and colleague and he made tremendous contributions to the work of the Committee. At Judge Sutton’s suggestion, the Committee observed a moment of silence in memory of Mr. Levy.

During the meeting, Judge Sutton and Committee members presented tokens of appreciation to Judge Stewart for his service on the Committee from 2002 onward and for his leadership of the Committee from 2006 to 2009, and to Judge Ellis for his service as a member of the Committee from 2003 to 2009. Judge Sutton thanked Judge Stewart for his wise guidance of the Committee’s deliberations, and noted that Judge Stewart had provided a model for him to follow as the incoming Chair of the Committee. Judge Stewart said that he had greatly enjoyed serving as a member of the Committee and, later, as its Chair. He observed that he valued the Committee members’ commitment and collegiality. He expressed appreciation to the Chief Justice for appointing him to serve and to Judge Rosenthal for her leadership of the parent Committee. He thanked the Reporter for her work, and he thanked Mr. McCabe, Mr. Rabiej, Mr.

Ishida, Mr. Barr, and others at the AO who have done so much to keep the Committee working smoothly, and Ms. Leary whose research at the FJC has informed the Committee's assessment of many issues. Judge Sutton thanked Judge Ellis for providing such clear and thoughtful input during the Committee's meetings. Judge Ellis stated that he was honored to have had the opportunity to serve on the Committee, and he expressed his appreciation to all the participants in the Committee's work.

Judge Sutton observed that the camaraderie of the Appellate Rules Committee meetings over the years has produced a scholarly product in the form of the manuscript for a new textbook on state constitutional law co-authored by, inter alios, Justice Holland, Dean McAllister, and Judge Sutton.

II. Approval of Minutes of April 2009 Meeting

The minutes of the April 2009 meeting were approved subject to minor changes on pages 2 and 3.

III. Report on June 2009 meeting of Standing Committee

The Reporter briefly noted some relevant aspects of the Standing Committee's discussions at its June 2009 meeting. The Standing Committee gave final approval to the proposed amendments to Appellate Rules 1(b), 29(a), and 29(c) and Form 4. The Standing Committee also discussed the proposed amendment to Appellate Rule 40(a)(1) and remanded that proposal to the Appellate Rules Committee. During the summer, the Appellate Rules Committee and the Standing Committee approved, by email circulation, a proposed technical amendment to Appellate Rule 4(a)(7); this amendment conforms Rule 4(a)(7) to changes made during the 2007 restyling of the Civil Rules by replacing references to Civil Rule "58(a)(1)" with references to Civil Rule "58(a)." In September 2009 the Judicial Conference approved the package of amendments to Appellate Rules 1(b), 4, and 29, and Form 4.

IV. Other Information Items

The Supreme Court has approved a number of proposed amendments that are currently on track to take effect on December 1, 2009, assuming that Congress takes no contrary action. The amendments include the proposed clarifying amendment to Rule 26(c)'s three-day rule; new Rule 12.1 (and new Civil Rule 62.1) concerning indicative rulings; an amendment that removes an ambiguity in Rule 4(a)(4)(B)(ii); an amendment to Rule 22 that parallels amendments to the habeas and Section 2255 rules; and the package of time-computation amendments.

The Sealing Subcommittee, chaired by Judge Hartz, has been working diligently to investigate concerns raised about the sealing of entire cases. The Subcommittee met in June 2009. It has formed two sub-subcommittees: One sub-subcommittee, on which Judge Ellis and Mr. Letter have participated, is investigating what, if any, substantive standards should govern

the sealing of entire cases and who should make the decision to seal. The other sub-subcommittee, chaired by Judge Merryday, is considering what procedures, if any, should be followed in sealing entire cases.

The Privacy Subcommittee, on which Mr. Bennett serves as the representative of the Appellate Rules Committee, met in September 2009 and will meet again in January 2010. The Subcommittee is planning a conference in April 2010 at Fordham that will feature panels on cooperation agreements, transcripts, and other matters that raise privacy issues.

The Civil Rules Committee has organized a May 2010 conference, to be held at Duke, that will consider the challenges facing the civil justice system. Panels at the conference will discuss new empirical data and will focus on issues such as pleading, discovery (including electronic discovery), and judicial case management. The panels will incorporate perspectives from experienced practitioners, from state procedural systems, from bar association proposals, and from those experienced in the rulemaking process. Judge Rosenthal observed that a number of factors have combined to highlight the importance of the conference. There is a great deal of congressional interest in the question of pleading standards. The conference will make available new and better empirical data on questions such as the burdens of discovery. It will be invaluable to obtain real data with which to inform judgments about the system.

The House of Representatives held an oversight hearing concerning pleading standards, in anticipation of the introduction of a bill. S. 1504, the bill currently pending in the Senate, would provide that federal courts shall not dismiss complaints under Rule 12(b)(6) except under the standards set forth in *Conley v. Gibson*, 355 U.S. 41 (1957). The Civil Rules Committee and the Standing Committee – assisted by Judge Rosenthal’s law clerk Andrea Kuperman – are carefully studying the effects of the Supreme Court’s decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). That research focuses on all of the court of appeals opinions as well as some district court decisions that cite *Iqbal*. The results so far disclose that, overall, courts are applying *Iqbal* in a thoughtful, context-specific and nuanced way. The research also includes a hard look at the overall statistics that reflect what courts are doing – including the rate of motions, the rate of grants, rulings on requests for leave to amend, the success of such amendments, and the effect on particular types of cases (such as types of cases that tend to feature information asymmetries between the plaintiff and defendant). It is too early as yet to draw any conclusions about *Iqbal*’s effects. Judge Stewart observed that *Iqbal* itself was a very atypical case. Mr. Letter asked whether any cases can be found in which a court states that it would not have granted a particular motion to dismiss under the pre-*Iqbal* standard, but that the post-*Iqbal* standard leads the court to dismiss. Judge Rosenthal responded that though some such cases do exist, many other opinions state that the motion would have been decided the same way under either standard.

V. Action Item

A. For publication

1. Item No. 08-AP-M (interlocutory appeals in tax cases)

Judge Sutton invited the Reporter to introduce this item, which concerns the procedure for interlocutory tax appeals. As the Committee has previously discussed, in 1986 Congress enacted 26 U.S.C. § 7482(a)(2), which adopts for interlocutory appeals from the Tax Court a system similar to that provided by 28 U.S.C. § 1292(b) for interlocutory appeals from district courts. The Appellate Rules, however, were never amended to take account of Section 7482(a)(2)'s interlocutory-appeal mechanism. The Committee has discussed the possibility of amending Title III of the Appellate Rules to make clear that Appellate Rule 5 applies to interlocutory appeals under Section 7482(a)(2). Informal inquiries with Judge Holmes of the Tax Court indicate that such amendments would be useful even though the universe of affected appeals might be small.

The proposed amendments set forth in the agenda materials take the approach of distinguishing Tax Court “decisions” from Tax Court “orders” – an approach that would entail changes in Title III’s heading, in Rule 13(d)(1), in the title of Rule 14, and in Rule 14(a). The proposal would then specify in a new Rule 14(b) the treatment of interlocutory appeals from Tax Court “orders.” The Reporter noted, however, that an attorney member had made a very helpful suggestion in advance of the meeting concerning a possible alternative approach.

The member explained that the approach shown in the agenda materials places great weight on the technical distinction between a Tax Court “decision” and a Tax Court “order.” She questioned whether all users would understand that this distinction is meant to express the difference between appeals as of right from final decisions and appeals by permission from interlocutory orders. She noted that interlocutory “orders” are often reviewed in the course of an appeal as of right from a final decision. She suggested that Title III’s heading might be revised to refer to “Appeals From the United States Tax Court.” Rule 13 could be revised to refer to “Appeals as of Right,” and Rule 14 could be revised to treat “Appeals by Permission.” Committee members agreed with this suggested approach.

The Reporter also raised some additional drafting choices. What provisions should be included for or excluded from application to tax appeals? And should the Rules contain a global definition that defines “district court” and “district clerk” to encompass the Tax Court and its clerk? There was consensus that a global definition would likely be useful. A member asked why the Title III rules refer to review of “decisions” rather than “judgments”; the Reporter said that she would research this question.

Judge Rosenthal suggested that, prior to the Committee’s spring meeting, it would be useful for the Committee to reach out to the tax bar and bench, as a way of obtaining advance comment on the proposals before deciding whether to seek permission to publish them officially for comment. The American Bar Association’s Tax Section would be a useful resource, as

would the judges on the Tax Court and Mr. Letter's colleagues in the DOJ. It is worth asking these groups whether the changes are needed and how the changes should be drafted.

By consensus, it was decided that the Reporter would prepare a proposed re-draft of the Title III rules, and that Judge Sutton would write to relevant constituencies to seek advance comment on the possible amendments.

VI. Discussion Items

A. Item No. 03-09 (FRAP 4(a)(1)(B) & 40(a)(1) – treatment of U.S. officer or employee sued in individual capacity)

Judge Sutton invited the Reporter to summarize the status of this item. This item originally concerned the DOJ's proposal for changes to both Rule 4(a)(1) and Rule 40(a)(1). After the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), the DOJ withdrew its proposal to amend Rule 4, but continued to support amending Rule 40. The proposed Rule 40 amendment received final approval at the Committee's fall 2008 meeting, and it was on the discussion agenda at the January 2009 Standing Committee meeting. Shortly thereafter, certiorari was granted in *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 988 (2009) – a case that presented a question concerning the interpretation of Rule 4(a)(1)(B) and 28 U.S.C. § 2107 – and the DOJ suggested putting Item No. 03-09 on hold pending the outcome of *Eisenstein*. In June 2009, the Standing Committee remanded Item No. 03-09 to the Appellate Rules Committee for further consideration in the light of the expected decision in *Eisenstein*. The ensuing decision in *Eisenstein* held that the United States is not a "party" to a False Claims Act qui tam action, for purposes of applying Section 2107 and Rule 4(a)(1), unless the United States has intervened in the action.

The Reporter turned to Mr. Letter for his report on the views of the DOJ. Mr. Letter explained that the DOJ supports moving forward with the amendment to Rule 40. The Rule 40 issue frequently arises, in that the government regularly finds it has to seek extensions of the time to seek rehearing in cases that involve government employees sued in their individual capacity for acts in connection with federal duties. As to the possibility of amending Rule 4, Mr. Letter questioned whether a rulemaking change to Rule 4 would produce the desired effect in the absence of a similar legislative amendment to Section 2107. He noted that the DOJ might propose such a statutory change at some future point.

A member questioned whether it makes sense to amend Rule 40 without also amending Rule 4. An attorney member expressed reluctance to recommend amending Rule 4; she noted that often private attorneys are retained to defend suits against federal officials. Those private attorneys might not be as well informed as DOJ lawyers would be, and they might rely on the text of such an amended Rule 4 without realizing the dangers of relying on a Rule 4 change that diverged from the text of Section 2107. This risk would also exist for the attorneys for other parties in such a case. A judge member agreed that it would be undesirable to have a rule that is inconsistent with the statute.

An appellate judge stated that he supports the Rule 40 proposal because it would eliminate a number of extension motions. Another appellate judge noted that his court receives many such extension requests, and typically grants them. Mr. Letter observed that even if the request is ultimately granted, that grant may not always occur promptly, and the delay before the grant can cause problems for the government's planning. Moreover, the additional time is not needed only for the Solicitor General to decide whether to seek rehearing; if the Solicitor General decides *not* to seek rehearing, the employee may need time to obtain private counsel for the purpose of seeking rehearing.

Judge Sutton noted that he sensed consensus that if Rule 4, Section 2107 and Rule 40 could all be amended to clarify the treatment of federal officers and employees sued in an individual capacity, that would be useful. Judge Rosenthal observed that on prior occasions the rulemakers have coordinated a rulemaking change with proposed legislation. It was suggested that amending Rule 40 without amending Rule 4 might "take care of the tail but not the dog." Professor Coquillette expressed optimism that a legislative amendment could be accomplished.

Members also discussed the wording of the Rule 40 proposal as approved at the fall 2008 meeting. A participant questioned whether the language "for an act or omission occurring in connection with duties performed on the United States' behalf" captured the sense that the Committee desires. One DOJ attorney had suggested to Mr. Letter that this language might lead to litigation over whether a particular act or omission did or did not qualify; this attorney had queried whether a better formulation might be one that captures cases in which "any party claims that the act or omission occurred in connection with [etc.]." The Reporter noted that the Committee had discussed a somewhat similar question at the fall 2008 meeting.

At the fall 2008 meeting, the Committee had before it comments from the Public Citizen Litigation Group ("Public Citizen"), expressing concern that the language in the proposed Rule 4 and Rule 40 amendments could be read to exclude instances when the court of appeals ultimately concluded that the federal officer's or employee's act did not occur "in connection with duties performed on the United States' behalf." Public Citizen argued that the wording should be changed to make clear that the extended time periods' availability turned on the nature of the act as alleged by the plaintiff rather than on the nature of the act as ultimately found by the court. Public Citizen suggested that this could be achieved by changing "an act or omission occurring in connection with" to read "an act or omission alleged to have occurred in connection with." At the meeting, however, a participant objected that the time period for rehearing should not turn on the way in which the complaint was framed. Also, it was pointed out that the uncertainty that concerned Public Citizen would presumably be less in connection with Rule 40(a)(1) (compared to the concern over Rule 4(a) and appeal time) because where the question is the time to seek rehearing, there will already be a panel opinion which will indicate the panel's view of the facts. The Committee also noted that Public Citizen's proposed language would diverge from the language used in Civil Rule 12(a).

After this discussion was recapitulated, members at the fall 2009 meeting did not express an immediate inclination to alter the proposed language shown in the agenda materials. However, it was noted that if the DOJ wished to propose alternative language it could do so in advance of the spring 2010 meeting.

The Committee discussed the possible timing of a rule change and legislative proposal. Mr. McCabe noted that if the Committee were to conclude that no republication is needed, then the rules amendment could take effect (assuming approval at each relevant step) on December 1, 2011. Mr. Letter noted that he would not be in a position to vote to request legislation without first seeking authorization to do so. Mr. Rabiej noted that the rulemakers would need to obtain permission from the Judicial Conference in order to seek legislation. A participant wondered whether a proposed legislative amendment might become complicated through association with other questions relating to government litigation.

By consensus, the Committee decided to retain the matter on the agenda and to revisit these questions at the Committee's spring 2010 meeting.

B. Item No. 05-05 (FRAP 29(e) – timing of amicus filing)

Judge Sutton invited the Reporter to present this item, which had been pending for some years. Prior to 1998, the briefing deadlines for amici were the same as those for the party whom the amicus supported. In 1998, Rule 29 was amended to stagger those deadlines by placing the amicus's deadline 7 days after the filing of the brief of the party supported. The Public Citizen Litigation Group initially expressed concern about this 7-day stagger, noting that it shortened the time within which the appellant can review (and address in the reply brief) assertions made in briefs of amici supporting the appellee. The Committee discussed those concerns in fall 1999 but decided to take no action on them. In 2002, Rule 26(a)'s time-computation provision was amended to shift the trigger (for skipping intermediate weekends and holidays) from "less than 7 days" to "less than 11 days." In 2005, Public Citizen expressed concern that the 2002 time-computation change effectively lengthened the 7-day stagger, and suggested that Rule 29(e) be amended to refer to "7 calendar days." This proposal was considered by the Appellate Rules Committee's Deadlines Subcommittee, which expressed no view on whether the stagger should be retained but suggested that if the stagger were to be retained then the period should be amended to provide that the 7-day period should be counted on a days-are-days basis. In the meantime, Mr. Letter had consulted some 24 practitioners (including attorneys in various types of practice) concerning the possibility of amending Rule 29(e). He received ten responses, and the respondents unanimously opposed abandoning the stagger. They pointed out that the stagger provides time for the potential amicus to decide whether to file at all, as well as to revise the amicus brief to avoid redundancy. Some noted that briefing in the court of appeals tends to be less coordinated than briefing in the Supreme Court. The respondents did differ somewhat on whether to adjust the length of the stagger.

The main concern expressed by Public Citizen in 2005 has now been addressed. Effective December 1, 2009 (assuming no contrary action by Congress), Rule 29(e)'s 7-day period will be computed on a days-are-days basis. This suggests that the main motivation for this agenda item has now been removed. There is, though, one additional concern expressed by Public Citizen: namely, that amicus deadlines run from the filing of the relevant brief, but the parties' deadlines run from the service of the relevant brief. Public Citizen suggested that this feature results in additional time pressure on the party responding to the amicus, and it proposed that Rule 29(e) should be amended to run the amicus deadline from service rather than filing, and

also suggested that amici should be encouraged to serve their briefs electronically. The Reporter suggested that these additional concerns would be rendered largely moot by the advent of electronic filing.

Mr. Letter noted that in the time since Public Citizen first raised its concerns, the Supreme Court has amended its own rules to add a similar time stagger.

A motion was made to remove Item No. 05-05 from the Committee's agenda. The motion passed by voice vote without opposition. Judge Sutton stated that he would make sure a letter is written to Public Citizen to inform it of this disposition.

C. Civil Rules Committee – query concerning three-day rule

Committee members next discussed an inquiry received from the Civil Rules Committee. Under Appellate Rule 26(c), the “three-day rule” is a provision that adds three days to a given period if that period is measured after service and service is accomplished electronically or by a non-electronic means that does not result in delivery on the date of service. Similar provisions exist in the Civil, Criminal and Bankruptcy Rules. Some comments received during the time-computation project had suggested that the “three-day rule” should be altered or abolished in the light of changes such as the advent of electronic filing. The Appellate Rules Committee's Item No. 08-AP-C concerns the suggestion that Rule 26(c)'s three-day rule be amended; the Committee discussed that item at the fall 2008 meeting and decided to retain it on the study agenda while encouraging the other advisory committees to consider the question. Judge Kravitz and Professor Cooper have now reported that the Civil Rules Committee discussed the three-day rule at its fall 2009 meeting, and they have requested the views of the Appellate Rules Committee and the other advisory committees. Evidently, the discussion at the Civil Rules Committee meeting supported a wait-and-see approach to the matter at the current time.

Mr. Letter reported that he had polled his colleagues, who state that in their experience where the case management / electronic case filing (“CM / ECF”) system is used to accomplish service it is unproblematic, but that this is not yet true in all circuits. For example, the Second Circuit does not use the CM / ECF system to effect service. Instead, electronic service among parties litigating before the Second Circuit is accomplished by email. And there are many horror stories about glitches with email service.

Mr. Rabiej reported that several clerks have noted that the time-computation project strove to set time periods in multiples of seven so that the periods would not end on a weekend, and that adding three days at the end of such periods can frustrate that objective.

An attorney member suggested that the Appellate Rules Committee should wait to act on this matter until all the circuits use the CM/ ECF system to accomplish service. He suggested that when the Committee does turn to the question of eliminating the three-day rule, it should also consider whether to lengthen the deadlines for responding to motions.

Mr. Green reported that in the Sixth Circuit the clerk's office sees very few problems with electronically served documents bouncing back. He observed that the last circuits to go live on ECF are scheduled to do so in January 2010. Mr. Letter predicted that prisoner litigation will always involve paper filings.

Judge Rosenthal suggested that the issue of the three-day rule forms a part of a larger set of questions concerning the shift to electronic filing. Judge Sutton noted that the Bankruptcy Rules Committee's project to review Part VIII of the Bankruptcy Rules is motivated partly by a desire to take account of the switch to electronic filing. Over the coming years, the advisory committees are all likely to consider amendments to take account of this shift – probably through a coordinated, inter-committee project akin to the time-computation project.

The Committee directed the Reporter to convey the gist of the Committee's discussion to Judge Kravitz and Professor Cooper. In sum, the Appellate Rules Committee agrees with the Civil Rules Committee that this question will need to be addressed within the next few years but that, for the moment, it warrants a wait-and-see approach.

D. Item No. 07-AP-E (issues relating to *Bowles v. Russell*)

Judge Sutton invited the Reporter to summarize recent developments relating to *Bowles v. Russell*, 551 U.S. 205 (2007). The agenda materials attempt to give some sense of the effects of *Bowles* by examining selected post-*Bowles* decisions. The sample analyzed in the materials is not randomly selected, so it is important not to assume that the analysis is representative of the universe of cases as a whole. Out of a sample of 36 decisions, whether the relevant requirement was jurisdictional or non-jurisdictional affected the disposition of the appeal in 23 cases. Of those 23 cases, there was a fairly even split: in 11 cases the choice (jurisdictional or non-jurisdictional) resulted in the loss of appellate rights, while in another 9 the choice resulted in the preservation of appellate rights. (A couple of cases were more difficult to classify.)

The agenda materials also discuss whether courts are likely to make use of the clear statement rule set by *Arbaugh v. Y&H Corporation*, 546 U.S. 500 (2006), to help discern whether a statutory appeal requirement is jurisdictional. A Westlaw search for federal court opinions discussing that clear statement rule revealed no cases discussing appellate jurisdiction or procedure. There are roughly 20 federal court opinions that discuss both *Bowles* and *Arbaugh*. The pending case of *Reed Elsevier v. Muchnick* – which presents the question whether 17 U.S.C. § 411(a) restricts subject matter jurisdiction for copyright infringement actions – might offer the Supreme Court an opportunity to clarify when courts should apply *Arbaugh*'s clear statement rule. But it appears likely that most statutory appeal deadlines will be considered jurisdictional under *Bowles*.

Finally, the agenda materials consider whether authorities such as *Becker v. Montgomery*, 532 U.S. 757 (2001), might be employed to mitigate the effects of jurisdictional deadlines in cases where some document, filed within the appeal time, constitutes the substantial equivalent of a notice of appeal. Those authorities may well prove useful in that respect, but it should be noted that not all cases take the forgiving approach exemplified in *Becker*. A leading example of

the alternative, unforgiving, approach is *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). It should also be noted that even if a court is inclined to apply the *Becker* line of cases, those cases can only rescue an appeal if *some* document has been timely filed that could be considered the substantial equivalent of the notice of appeal.

The Committee took no action on this agenda item.

E. Item Nos. 08-AP-D, 08-AP-E, & 08-AP-F (possible changes to FRAP 4(a)(4))

Judge Sutton noted that Judge Bye, Mr. Letter and Ms. Mahoney are serving as representatives of the Appellate Rules Committee on the joint Civil / Appellate Subcommittee. That Subcommittee is chaired by Judge Colloton; the other representatives of the Civil Rules Committee are Judge Walker and Mr. Keisler. The Subcommittee conferred by telephone over the summer and considered a number of possible amendments to Appellate Rule 4.

One set of proposed amendments – Item No. 08-AP-D – grows out of Peder Batalden’s observation that under Rule 4(a)(4)(B) the time to appeal from an amended *judgment* runs from entry of the *order* disposing of the last remaining tolling motion. The proposal that the Subcommittee placed before the Appellate Rules Committee for discussion would amend Rule 4(a) so that the appeal time runs from the latest of entry of the order or entry of any amended judgment. A related proposal would clarify the operation of Civil Rule 58’s separate document requirement. Currently, the Seventh Circuit reads Civil Rule 58(a)’s reference to an order “disposing of” certain post-judgment motions as meaning orders “denying” such motions. Professor Cooper has pointed out that there can sometimes be orders that grant a tolling motion without actually leading to an amended judgment. The proposal would revise Civil Rule 58 to state that a separate document is not required “when an order – without altering or amending the judgment – disposes of a motion [etc.]” As Judge Colloton pointed out during the Subcommittee’s discussions, the Civil Rule 58(a) proposal is conceptually separable from the Appellate Rule 4(a) proposal. But a majority of the subcommittee members appeared to think that it is worthwhile to move forward with both proposals.

An attorney member stated that it seems useful to clarify these provisions. A judge member agreed that even if cases that would be affected by this issue may be rare, the issue is very important when it does arise.

On a somewhat related matter, a participant recounted the practice of one district judge who has on occasion entered a judgment on a separate document before filing an opinion with respect to the judgment. In such instances, a footnote to the judgment states that the judge will later issue an opinion and that the judgment should not be considered a final appealable judgment until the opinion issues. A question has arisen as to whether the entry of the judgment starts the appeal time running. A district judge observed that there is no reason for the judge in question to enter judgment on a separate document at that point – why not just state the disposition but hold off on entering judgment on a separate document until after the opinion is ready to issue? It was also observed that if the appeal time starts to run and a notice of appeal is

filed, then the pendency of the appeal may call into question the district judge's authority, at that point, to provide new reasoning in support of the judgment that is on appeal.

The Committee next discussed another set of proposals – Item Nos. 08-AP-E and 08-AP-F – that had also been considered by the Civil / Appellate Subcommittee. These items concern suggestions by Public Citizen and by the Seventh Circuit Bar Association Rules and Practice Committee that Rule 4(a) be amended so that an original notice of appeal encompasses appeals from orders disposing of tolling motions. Such an approach, if adopted, would parallel the approach currently taken by Rule 4(b)(3)(C) for criminal appeals. But as the Subcommittee discussed, any such amendment to Rule 4(a) would face significant drafting problems. One difficulty is that under current law, not every notice of appeal encompasses every *previously*-resolved issue. In particular, under the expressio unius canon a notice of appeal that specifies particular orders can be read to exclude by implication any orders not mentioned. If the rule is to be amended to provide that a previously filed notice encompasses challenges to later dispositions of tolling motions, should such a provision encompass all notices or should it exclude notices that specify only one or more specific prior orders? There are also questions as to how one would treat actions involving multiple parties. In any event, apart from these drafting difficulties, Subcommittee members did not discern a need for such an amendment.

By consensus, the Committee decided to remove Item Nos. 08-AP-E and 08-AP-F from its study agenda.

F. Item No. 08-AP-G (substantive and style changes to FRAP Form 4)

Judge Sutton invited the Reporter to provide an update on her research relating to this Item, which concerns the possibility of revising Form 4 in various ways. The Reporter recounted that her most recent research was designed to investigate suggestions that Form 4's Questions 10 and 11 seek information that might be protected by work product protection. Question 10 asks those applying to proceed in forma pauperis whether they have paid or will pay an attorney for services in connection with the case, and if so, asks how much and whom. Question 11 requests similar information concerning payments to anyone other than an attorney.

To the extent that Question 11 might be read to encompass payments to investigators or experts (especially non-testifying experts), it seems to raise questions about work product protection. And because many of those who seek to appeal in forma pauperis will be proceeding pro se, it makes sense to consider in particular the scope of work product protection for pro se litigants. Cases concerning protection for the work product of pro se litigants are sparse. But it does appear that pro se litigants' work product should be viewed as falling within the scope of work product protection. Civil Rule 26(b)(3)(A) refers to materials prepared "by or for [a] party or its representative." This dates back to the 1970 amendments to Rule 26, which clarified that work product protection extends beyond lawyers' work. Those who prepared the 1970 amendments appear to have been intending to cover the work of non-lawyer investigators; but the existing language does extend more broadly and appears to cover the work product of pro se litigants.

A district judge asked why the court of appeals needs the answers to Questions 10 and 11 – or, for that matter, a number of other questions in Form 4 – when deciding whether to permit the applicant to appeal in forma pauperis. He suggested that Questions 10 and 11 could be eliminated. What the judge wants to know, he stated, is how much money the applicant has, not what he or she spends it on. An attorney member asked whether any judge is known to have denied a motion for i.f.p. status based on information elicited by Questions 10 and 11. An appellate judge suggested that Questions 10 and 11 can elicit information germane to the question of i.f.p. status, in the sense that a judge might wish to know how much money the applicant is spending on matters relating directly to the litigation itself. An attorney member suggested that perhaps instead of Questions 10 and 11 one could substitute the following simpler formula proposed by certain pro se staff attorneys: “whether funds have been or will be used in the prosecution of the litigation for costs or attorney’s fees.”

Members discussed the fact that one of the pieces of information that might be disclosed in response to Question 10 is whether the applicant has obtained legal assistance for certain parts of the litigation, even if the applicant is not formally represented by the lawyer in question. This connects to a broader debate over the “unbundling” of legal services. Professor Coquillette observed that the topic of “unbundling” has been the subject of much discussion in the American Bar Association. A district judge stated that if an applicant is receiving any assistance from a lawyer with respect to the litigation, the judge wants to know of the lawyer’s involvement because the lawyer should be subject to the discipline of the court.

A judge member asked whether the information elicited by Form 4 is shared with the applicant’s opponent. Mr. Green stated that in the Sixth Circuit that information is not provided to the opponent, but he also stated that the practice on this question varies from circuit to circuit. Mr. Green observed that in cases where an application for i.f.p. status is coupled with a motion for appointment of counsel – either Criminal Justice Act (“C.J.A.”) counsel or pro bono counsel – the information elicited by Questions 10 and 11 could be relevant to the latter. A participant stated that the C.J.A. form is not put into the court record, but he expressed uncertainty as to whether the C.J.A. form is shared with the DOJ. Mr. Letter undertook to obtain the answer to this question.

An attorney member stated that it would be advisable to find out more about the Supreme Court’s practice on i.f.p. applications. Applicants seeking i.f.p. status before the Supreme Court are directed to employ Form 4. Members agreed that it is important to obtain more information about practice in the Supreme Court. Would practice in the Supreme Court be adversely affected if Questions 10 and 11 were replaced with the briefer question “whether funds have been or will be used in the prosecution of the litigation for costs or attorney’s fees”? Is the detail currently sought in Form 4 necessary for the review of i.f.p. applications in the Supreme Court? The possibility was noted that one could propose the adoption of different forms for use in the Supreme Court and in the lower courts.

G. Item No. 08-AP-L (FRAP 6(b)(2)(A) / Sorensen issue)

Judge Sutton invited the Reporter to introduce this item, which concerns an ambiguity in Rule 6(b)(2)(A)(ii). The relevant language is similar to that in Rule 4(a)(4)(B)(ii). In both instances, the rules refer to challenges to “a judgment altered or amended” upon a post-judgment motion (or “an altered or amended judgment”) – when they should instead refer to challenges to the alterations or amendments. An amendment designed to remove this ambiguity from Rule 4(a)(4)(B)(ii) is on track to take effect December 1, 2009 (absent contrary action by Congress). At the fall 2008 meeting, the Committee discussed the possibility of making a similar change to Appellate Rule 6(b)(2)(A)(ii). The Committee decided to seek guidance from the Bankruptcy Rules Committee. The Bankruptcy Rules Committee referred the question to its Subcommittee on Privacy, Public Access and Appeals. That Subcommittee reviewed the proposal, concluded that the proposed amendment would be useful, and suggested refinements to the wording of the proposed amendment. The Bankruptcy Rules Committee adopted the views of its Subcommittee.

The Reporter noted that the Bankruptcy Rules Committee’s refinement of the proposal is very constructive. The Reporter suggested that it will be important to coordinate the Appellate Rule 6 amendment with the possible amendments to Appellate Rule 4 and Bankruptcy Rule 8015. If the Bankruptcy Rules Committee’s Part VIII revision project moves forward, then Bankruptcy Rule 8015 may be renumbered – a change that would necessitate a conforming change to Appellate Rule 6. It is also worth noting that both Bankruptcy Rule 8015 and Appellate Rule 6 address the question of the timing of an appeal after disposition of a timely rehearing motion, and that these rules do so in inconsistent ways. And it may be useful to consider whether Rule 6(b) should conform to the approach currently proposed for Rule 4(a)(4) by the Civil / Appellate Subcommittee – i.e., specifying that when a timely rehearing motion is made the time to appeal runs from the latest of the entry of the order disposing of the last such remaining motion or entry of any altered or amended judgment. The Bankruptcy Rules Committee has not yet had an opportunity to consider that point. For all these reasons, it may make sense for any proposed change to Rule 6 to proceed in tandem with the Part VIII revision project, and for the Appellate Rules Committee to seek the Bankruptcy Rules Committee’s guidance on the additional questions mentioned here.

Mr. Letter reported that he had discussed the Rule 6 proposal with Christopher Kohn, the DOJ’s longtime representative on the Bankruptcy Rules Committee, and that Mr. Kohn had stated that the suggestion concerning Rule 6 looked right to him. By consensus, the Committee retained this item on the study agenda and resolved to seek further input from the Bankruptcy Rules Committee.

H. Item No. 08-AP-P (FRAP 32 – line spacing of briefs)

Judge Sutton invited the Reporter to introduce this item, which arose from Mr. Batalden's suggestion that Rule 32 should be amended to provide for 1.5-spaced instead of double-spaced briefs. At the spring 2009 meeting, members also discussed the possibility of permitting briefs to be printed double-sided. Members expressed diverse views; much discussion centered on the potential significance of the ongoing shift to electronic filing. After the spring 2009 meeting, Mr. Rabiej had asked Mr. Ishida to review the history of prior proposals to amend Rule 32 to provide for double-sided briefs. The agenda materials include Mr. Ishida's very helpful memo detailing that history, as well as excerpts from a 1995 Appellate Rules Committee report that summarized the comments submitted on the double-sided printing proposal.

An attorney member stated that she would like to hear from the judge members of the Committee what they thought about the proposal. Justice Holland noted that the Delaware Supreme Court permits double-sided (but double-spaced) printing for printed briefs, and that two-sided printing has not been a problem; he also noted that the lawyers are required to provide hard copies for all the justices and their clerks. A district judge asked whether the shift to electronic filing would moot the question. Mr. Green noted that even with the shift to e-filing, all circuits other than the Sixth Circuit still require the submission of hard copies of briefs. An appellate judge noted that once a brief is electronically filed, each judge can have it printed precisely the way he or she prefers. Another appellate judge noted that the problem of eye strain is likely to prevent judges from simply reading briefs on-screen without printing them. He stated that judges on the Fifth Circuit generally want to receive hard copies of the briefs. Another appellate judge agreed that many judges are likely to continue to want hard copies, though their law clerks may read the briefs on the screen; he noted that the need to print out electronically filed briefs has created a great deal of work for the judicial assistants. Another appellate judge noted that the Eighth Circuit was an early adopter of electronic filing. He stated that his assistant prints out copies of the electronically filed briefs for him; he prefers single-sided printing, though his clerks do not.

An appellate judge suggested that as time progresses, this item might usefully be addressed as part of the set of issues that relate to electronic filing. An attorney member questioned whether line-spacing really will become moot with the shift to electronic filing; she noted that if a judge chooses to have electronic double-spaced briefs printed out with 1.5 or single line spacing, the brief's internal page references will no longer make sense. But it was noted that the question of line-spacing does relate to the question of double-sided printing, and the latter question does appear to be shifting in valence with the adoption of electronic filing.

By consensus, the Committee resolved to keep this item on its study agenda.

I. Item No. 09-AP-B (definition of "state" and Indian tribes)

Judge Sutton invited the Reporter to introduce this item, which concerns Daniel Rey-Bear's suggestion that the term "state" be defined, for purposes of the Appellate Rules, to

include federally recognized Native American tribes. There are two possible ways to proceed with this suggestion: one option would be to consider a global definition of the type proposed by Mr. Rey-Bear; a second option would be to examine each Appellate Rule in which the term “state” appears and to consider how to treat Native American tribes for purposes of each such rule.

If one considers the question on a rule-by-rule basis, some rules appear to present more significant issues than others. Mr. Rey-Bear states that there are no federal courthouses that are located within federally recognized Indian reservations; assuming this to be the case, it would appear to make no practical difference whether Native American tribes are treated the same as states for purposes of applying the definition of legal holidays in Rule 26(a)’s time-computation provisions. Mr. Rey-Bear also states that tribal courts’ attorney admission standards typically require admission to practice before the bar of a state’s highest court, and he suggests that therefore treating tribes as states for purposes of Rule 46 would not change current practice. Professor Coquillette stated that Mr. Rey-Bear’s assessment is an accurate description of current practice, but he noted that tribal practices might change; he also observed that admission to practice before the federal courts of appeals (under Rule 46) also has implications for practice in other jurisdictions. Treating tribes the same as states for purposes of Rule 22’s certificate-of-appealability provisions could result in a change in current law. Federal habeas review for persons detained by a Native American tribe is governed by a distinct statutory framework and it is not at all clear that this framework requires a petitioner who has lost in the district court to obtain a certificate of appealability in order to appeal. As to Rule 44, it seems eminently sensible to require that a tribe be notified of litigation in which the validity of the tribe’s laws is at stake; but Rule 44 is drafted in terms of challenges to the *constitutionality* of a law, and that language seems like a poor fit as to tribal laws, given that the federal-law constraints on tribal authority appear to be more in the nature of federal common law than federal constitutional law.

Rule-by-rule consideration of Mr. Rey-Bear’s suggestion also may be useful because Mr. Rey-Bear’s concern appears to center on the operation of Rule 29’s provisions for amicus filings. Mr. Rey-Bear argues that tribes should not be required to seek party consent or court leave in order to file an amicus brief, and he also objects to the inclusion of tribes within the proposed new authorship-and-funding disclosure requirement that is currently on track to take effect December 1, 2010 (if it is approved by the Supreme Court and Congress takes no action to the contrary).

An attorney member stated that if the Committee is considering whether to treat tribes the same as states for purposes of amicus filings, the Committee should expand its focus to consider cities and towns as well. She noted that the U.S. Supreme Court’s amicus-filing rule – Rule 37 – permits amicus filings (without court leave or party consent) by federal, state and municipal governments but not by tribes. She wondered how often a tribe’s request to file an amicus brief is denied. Ms. Leary stated that it would be possible to study this question empirically. A member questioned whether all Native American tribes would actually want to be included within the definition of “state”; tribes and states are different entities with different histories. This member stated that he can see merit in the arguments for treating tribes the same as states for purposes of Rule 29. He also agreed that it is worthwhile to consider whether to treat municipal governments the same as states, because all government entities are distinguishable

from private litigants. He suggested that the real issue here is the importance of according tribes as much dignity as states. A participant suggested that the equal-dignity rationale is potentially very expansive in its application, reaching well beyond questions of amicus filing and, indeed, beyond questions pertaining merely to the Appellate Rules.

A district judge noted that there is no Civil Rule governing amicus filings in the district court; requests to file amicus briefs in the district court are made, and often denied. He stated that it seems incorrect to define tribes as states. According the same treatment to tribes as to states may make sense for purposes of amicus filing, but he noted as well that as to a number of tribes there are disputes as to tribal recognition, and that tribes vary greatly in their size and characteristics. (It was noted that Mr. Rey-Bear's proposal would cover only federally-recognized tribes.)

Mr. Letter reported that he has not yet been able to ascertain the DOJ's position on this item. He noted that the dignity rationale is likely to be of considerable importance to the government. Concerning the question of whether tribes are denied leave to file amicus briefs, Mr. Letter recounted that a colleague of his in the environmental division of the DOJ has told him that tribes make a significant number of amicus filings. The courts generally permit such filings, though on some occasions some courts (it was not clear whether these were district courts or courts of appeals) have denied leave to file. Mr. Letter noted that though there is no rule governing amicus filings in the district court, there is a statute – 28 U.S.C. § 517 – that could be argued to authorize the United States to make amicus filings without court permission.

An attorney member suggested that all parties should be treated the same before the court, though he recognized that the United States has an institutional interest when federal statutes are under challenge. An appellate judge stated that courts should be receptive to tribes' amicus filings in cases that implicate tribal sovereignty or other issues of Indian law. Another participant asked whether tribes should be seen as more analogous to states or to foreign nations, for purposes of the amicus-filing question. The Reporter noted that Native American tribes may often have much more at stake in federal court litigation than a foreign nation would have, because the U.S. Supreme Court has made clear that the outer bounds of tribal authority are set by federal law. An attorney member noted, however, that denying a foreign nation leave to file an amicus brief might have foreign relations implications. A participant noted that states, the United States and foreign states are not persons for purposes of the Due Process Clause; he asked whether Native American tribes are persons for that purpose. The Reporter agreed to research this question.

Members discussed the fact that the authorship-and-funding disclosure requirement that is slated to take effect in 2010 as a new Rule 29(c)(5) links the application of that disclosure requirement to whether the litigant is permitted to make an amicus filing without party consent or court permission under Rule 29(a).

There was consensus among the meeting participants that the focus, going forward, should be on Rule 29's amicus-filing provisions rather than on the possibility of globally defining "state" to include Native American tribes. And the inquiry now encompasses whether to include municipal governments as well as tribal governments. Mr. Letter will continue his efforts to

gather information within the DOJ. Dean McAllister undertook to research the history of the U.S. Supreme Court's amicus rule, with a view to determining why Native American tribes are not treated the same as states by that rule. Ms. Leary will study amicus filings in the courts of appeals (over the past five or ten years) to determine whether and how often Native American tribes are denied leave to file amicus briefs. One way to focus the search might be to select courts in areas where numerous tribes are located. She will also research the nature of amicus-filing practices in some of the largest tribal courts.

VII. Additional Old Business and New Business

A. Item No. 09-AP-C (matters relating to the Bankruptcy Rules Committee's project to revise Part VIII of the Bankruptcy Rules)

Judge Sutton invited the Reporter to introduce this item. The Bankruptcy Rules Committee is considering a project to update Part VIII of the Bankruptcy Rules, which addresses appeals from bankruptcy court to district courts and bankruptcy appellate panels. One impetus for the project was the desire to update the Part VIII rules to take account of changes in the Appellate Rules on which they were modeled. But as the project has progressed, participants have also noted the need to update the Part VIII rules to take account of the shift to electronic filing. The Bankruptcy Rules Committee's Subcommittee on Privacy, Public Access and Appeals held an open subcommittee meeting to discuss the project in Boston in September 2009. It seems likely that the earliest that the project would be sent out for public comment – assuming that it progresses – would be the summer of 2011.

The Part VIII rules project seems likely to provide the Appellate Rules Committee with a useful model for adjusting the rules to the practice of electronic filing. In addition, the project provides a good opportunity to address the rules governing permissive direct appeals from bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). Interim procedures for those appeals were originally provided by a part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) that is set forth as a note to Section 158. The BAPCPA section setting forth those interim procedures specifies that its provisions apply until a rule relating to the relevant provision is promulgated through the rulemaking process. Such a rule – Bankruptcy Rule 8001(f) – did take effect in December 2008, and thus BAPCPA's interim procedures no longer apply as to matters covered in Bankruptcy Rule 8001(f). But though Bankruptcy Rule 8001(f) sets a 30-day deadline for petitions for permission to appeal, it does not otherwise address procedure in the court of appeals, except to direct the application of Appellate Rule 5. The Part VIII project contemplates putting in place Part VIII rules that would address appeals under Section 158(d)(2), and it thus seems advisable for the two advisory committees to consider jointly what changes, if any, might be appropriate for Appellate Rules 5 and 6. It also would be useful to consider how (and where) to address the compilation of the record for direct appeals. An interesting twist on this question is that in the first level of appeals from bankruptcy court to the district court or BAP, it may be possible to think of the record as simply consisting of a series of online links to the electronic components of the record. Overall, direct bankruptcy appeals present interesting complexities due to the multiple levels of courts – bankruptcy court,

district court or bankruptcy appellate panel, and court of appeals – that may be involved at various steps in the process.

A participant asked how frequently direct appeals are taken under Section 158(d)(2). The Reporter noted that research on that question is currently ongoing.

By consensus, the Committee retained this item on its study agenda and resolved to coordinate its efforts with those of the Bankruptcy Rules Committee.

B. Proposed Criminal Rule concerning indicative rulings

Judge Sutton suggested that the Reporter describe the Criminal Rules Committee’s work on a proposed new Criminal Rule concerning indicative rulings. The proposed new rule, which was approved for publication this fall by the Criminal Rules Committee, is largely modeled on Civil Rule 62.1 and is designed to dovetail with Appellate Rule 12.1. Presumably because the DOJ has expressed concern about the possible misuse of the indicative-ruling procedure in connection with Section 2255 proceedings, the Criminal Rules Committee modified the Note of the proposed new Criminal Rule to state that “[t]he Committee anticipates that this rule will be used primarily if not exclusively for newly discovered evidence motions under Rule 33(b)(1) (see *United States v. Cronin*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Rule 35(b), and motions under 18 U.S.C. 3582(c). This rule applies to motions ‘that the court lacks authority to grant,’ and therefore does not apply to motions under 28 U.S.C. 2255.”

VIII. Schedule Date and Location of Spring 2010 Meeting

The Committee tentatively discussed two possible dates for the spring 2010 meeting – April 8 and 9, 2010, and May 13 and 14, 2010.

IX. Adjournment

The Committee adjourned at 9:21 a.m. on November 6, 2009.

Respectfully submitted,

Catherine T. Struve
Reporter